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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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No. PD-0039-19

To the Court of Criminal Appeals of Texas

The State of Texas, Appellee

v.

John Christopher Foster, Appellant

Appeal from the Texas Court of Appeals
Third District, at Austin
03-17-00669-CR

STATE'S BRIEF

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Oral argument is requested

Identity of Parties and Counsel

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Cases

Statutes

To the Honorable Court of Criminal Appeals:

Now comes the State of Texas and files this brief, and in support thereof, respectfully shows the following:

Statement of the Case

A jury convicted Appellant of aggravated assault and assessed punishment at 17 years and six months' imprisonment and a $1,040 fine. CR 90-91.

The Third Court of Appeals reversed the judgment of conviction and remanded. *See Foster v. State*, No. 03-17-00669-CR, 2018 WL 3543482 (Tex. App.–Austin July 24, 2018). The court of appeals also overruled the State's motions for rehearing and for en banc reconsideration.

The Court of Criminal Appeals granted the State's petition for discretionary review, and the State's brief is due on June 17, 2019.

Statement Regarding Oral Argument

The court of appeals' decision conflicts with this Court's precedent regarding self-defense instructions. The State requests oral argument to expound on the arguments and comparisons below.

Questions Presented for Review

1. Is a defendant entitled to a jury instruction on self-defense when he testifies that he did not commit the charged offense and, at most, he admits to committing a separate lesser-included offense?

2. Does an appellate court correctly apply the standard of review for harm when it fails to consider significant evidence of guilt and the defensive theory put forth at trial, which was that the defendant did not commit the charged offense, not that he committed it in self-defense?

Statement of Facts

I. The charged offense

The State alleged that Appellant caused serious bodily injury to Sarah M., a member of his family or household or with whom he had a dating relationship, by pulling her hair or by cutting her with a knife, and that Appellant used a deadly weapon, to wit: a knife, during the commission of this assault. CR 5, 86.[1]

Aggravated assault is usually a second-degree felony, but it is a first-degree felony when, as here, the defendant is charged with causing serious bodily injury, and using a deadly weapon, and having a dating/family/household relationship with the victim. *See* Tex. Penal Code §22.02(b)(1).

At trial, the only evidence of "serious bodily injury" was an injury on the back of the victim's head where someone had sliced off a large portion of her scalp. 6RR 75, 97-99, 126; SX 13-16. The victim suffered other injuries as well (such as bruises, scratches, and a cut to her chin, 6RR 88-89), but there was no evidence that any of these injuries constituted "serious bodily injury."[2]

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[1] The indictment had some other manners and means, but the State abandoned them at trial.

[2] Serious bodily injury is defined as bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. Tex. Penal Code § 1.07(a)(46).

II. Appellant's testimony

The State will focus on Appellant's testimony, which he claims entitled him to a self-defense instruction.

Appellant's testimony basically boils down to a claim that Sarah scalped herself. Specifically, Appellant testified that, on the day of the offense, he got into an argument with Sarah, and he started packing a bag to leave. 7RR 98. He testified that he said some mean things to her and that she grabbed a knife off the counter and "started to cut her hair off." 7RR 99. He testified that he did not think she was actually cutting her hair and that he was busy looking for his phone and packing his things. 7RR 99. He testified that he went to grab his bag, and when he came back into the living room, he saw that she had hair in her hands. 7RR 99. He testified that he laughed because he had no idea of the extent of the injury that she had "committed to herself." 7RR 100.

Appellant testified that he then made a sexual advance on Sarah, and she defecated on herself to stop it. 7RR 100-101. He then broke her computer. 7RR 101.

Appellant testified that, after all of the events above, Sarah attacked him with the knife, and cut his neck and his side, so he made the decision to defend himself at that time. 7RR 102.

Appellant testified that he struggled for the knife and that he struck Sarah and pulled her to the ground. 7RR 106. He testified that Sarah was holding the knife close to her, like a baseball bat, during the struggle over the knife, and that the knife cut her chin during this struggle because she was holding it close to her chin. 7RR 106-07. He testified that he got on top of her and tried to claw at her hands to get the knife away from her. 7RR 108. He testified that he grabbed her by the neck and held her down. 7RR 108. He testified that he was able to pry Sarah's hands loose and gain control of the knife and throw it away. 7RR 108. He testified that he screamed at her, she stopped fighting, and he let her up. 7RR 109.

Appellant testified that Sarah ran to the neighbor's house for help at that point. 7RR 109. Appellant testified that he did not want the police called because he had a warrant and he did not want to go to jail. 7RR 109. He testified that he waited at the neighbor's door for a minute or so and then grabbed Sarah's arm to coerce her back inside. 7RR 110. He testified that she yanked her arm away and then they went to separate bathrooms to clean up. 7RR 110.

On cross-examination, Appellant said Sarah's hair could have gotten cut while they were struggling for the knife because Sarah was holding it close, but "I did not scalp her" and "I did not cut her hair." 7RR 128-29.

After the State played a jail call where Appellant told his mother that he cut Sarah's hair, Appellant got back on the stand and testified that "some of her hair was cut in the struggle." 7RR 140, 144; SX 63. Defense counsel then asked, "Did you cut her hair with a knife?" Appellant answered, "Technically--," to which counsel directed him to answer "Just yes or no," and Appellant said, "Yes, it happened." 7RR 144.

Summary of the Argument

First point: Self-defense is a "confession-and-avoidance" defense. Thus, to be entitled to a jury instruction on self-defense, a defendant must admit to committing the charged offense.

Here, the charged offense was aggravated assault causing serious bodily injury, and there was only one aggravated assault causing serious bodily injury in this case—an assault where someone sliced off a large portion of the victim's scalp.

Appellant flatly denied committing this assault, and he claimed that the victim did it to herself. Thus, he was not entitled to a self-defense instruction.

The court of appeals erred in holding that Appellant arguably admitted to causing the scalp injury because the court improperly plucked

statements out of the record and examined them in a vacuum to reach this conclusion.

The court of appeals also erred in holding that Appellant was entitled to a self-defense instruction based on his testimony that the victim's hair and chin were cut in a defensive struggle that occurred after the scalp injury. There was no evidence that these other cuts caused serious bodily injury, so this was not an admission to the charged offense, i.e., first degree felony aggravated assault causing serious bodily injury. At most, this was an admission to a separate, lesser-included, uncharged offense—e.g., second-degree aggravated assault, without serious bodily injury. Because Appellant did not admit to the charged offense, he was not entitled to a self-defense instruction on that offense, and the court of appeals erred in holding otherwise.

Second Point: The court of appeals did not correctly apply the standard of review for harm because it did not consider the entire record.

First, the court did not consider the actual defensive theory put forth at trial, which was that Appellant did not commit the charged offense, not that he committed it in self-defense. Consequently, the court failed to recognize that the jury had a vehicle by which to acquit the defendant.

The court of appeals also failed to acknowledge that the other cuts to Sarah's chin and hair did not amount to serious bodily injury, so those cuts could not be the basis for the charged offense. Thus, there was no harm in failing to give a self-defense instruction as to these cuts.

Finally, the court did not properly account for the significant evidence of guilt, or the fact that Appellant's version of events was both incredible and controverted by the evidence.

For all of these reasons, the court of appeals erred in finding harm in this case.

Argument

First Question for Review: Is a defendant entitled to a jury instruction on self-defense when he testifies that he did not commit the charged offense and, at most, he admits to committing a separate lesser-included offense?

I. Self-defense is a "confession-and-avoidance" defense.

It is well-settled that self-defense is a confession-and-avoidance defense, so a jury instruction is appropriate only when the defensive evidence essentially admits to every element of the offense and uses the defense to excuse the otherwise criminal conduct. *See Rogers v. State*, 550 S.W.3d 190, 192 (Tex. Crim. App. 2018); *Juarez v. State*, 308 S.W.3d 398, 399-404 (Tex. Crim. App. 2010) (discussing the history of the confession-

and-avoidance doctrine); *Shaw v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007) (explaining that "a defensive instruction is only appropriate when the defendant's defensive evidence essentially admits to every element of the offense"); *Ex parte Nailor*, 149 S.W.3d 125, 133 (Tex. Crim. App. 2004) (holding that appellant was not entitled to a justification defense because appellant argued that he did not commit the offense or the actions alleged by the State); *Young v. State*, 991 S.W.2d 835, 838-39 (Tex. Crim. App. 1999) (explaining that, in order to raise a justification defense, "a defendant admits violating the statute under which he is charged and then offers [the defense] as a justification which weighs against imposing a criminal punishment for the acts or acts which violated the statute", and holding that appellant was not entitled to a justification defense because he argued that he did not commit the offense or the actions alleged by the State).

II. Appellant flatly denied committing the charged offense.

Appellant was charged with aggravated assault causing serious bodily injury. CR 5, 86; *and see* Tex. Penal Code §22.02(b)(1). There was only one aggravated assault causing serious bodily injury in this case—an assault where someone sliced off a large portion of the victim's scalp. 6RR 75, 97-99, 126; SX 13-16.

Appellant did not admit to committing this aggravated assault, as required by the confession-and-avoidance doctrine. More than that, Appellant flatly denied committing it. 7RR 128 ("I did not scalp her"). Moreover, he testified that *Sarah* caused the scalp injury herself. 7RR 98-100. He also testified that Sarah caused the scalp injury *before* she attacked him with the knife, which precluded any possibility that Appellant caused the scalp injury in self-defense during the struggle over the knife. 7RR 100-08, 144.

This is not a case of form over substance—the defendant explicitly denied committing the charged offense. To require trial courts to give self-defense instructions in such a case would serve little purpose other than to muddy the waters and confuse the jury.

In short, Appellant did not admit to committing the charged offense, so he was not entitled to a self-defense instruction, and the court of appeals erred in holding otherwise.

III. The court of appeals improperly plucked statements out of the record and examined them in a vacuum to reach its conclusion that Appellant arguably admitted to the offense.

The court of appeals held that Appellant was entitled to a self-defense instruction because he "arguably admitted" to causing the scalp injury

when he testified that Sarah's hair was cut during the struggle over the knife. *Foster*, 2018 WL 3543482, at *6.

There are a couple of problems with this holding. First, it equated an admission that Sarah's *hair* was cut with an admission to slicing off a large portion of her *scalp* on the back of her head. The two are not equivalent.

Second, and more egregiously, the court of appeals plucked testimony out of the record and examined it in a vacuum. This was improper. *Cf. Ritcherson v. State*, No. PD-0021-17, 2018 Tex. Crim. App. LEXIS 1208, at *22 (Tex. Crim. App. 2018) (explaining that the appellate court should not pluck statements out of the record and examine them in a vacuum in deciding whether a defendant is entitled to a lesser-included offense); *and see McRay v. State*, No. 05-05-00286-CR, 2006 WL 874118 (Tex. App.—Dallas Apr. 6, 2006, no pet.) (refusing to look at a portion of the record in a vacuum and finding that the defendant was not entitled to a self-defense instruction when he denied committing the offense).

Specifically, in holding that Appellant admitted to causing the scalp injury, the court of appeals disregarded Appellant's explicit testimony that *he did not cause the scalp injury*. 7RR 128 ("I did not scalp her"). It also disregarded his testimony that *Sarah* caused the scalp injury herself. 7RR 98-100. It also disregarded the timeline of Appellant's testimony, which

was that Sarah caused the scalp injury *before* the struggle over the knife, which precluded any possibility that Appellant caused the scalp injury in self-defense during the struggle over the knife. 7RR 100-02.

IV. The court of appeals erred in concluding that Appellant was entitled to a self-defense instruction based on his admission to a separate, lesser-included, uncharged offense.

The court of appeals also held that Appellant was entitled to a self-defense instruction based on his admission that Sarah's chin and hair were cut when he was defending himself. *Foster*, 2018 WL 3543482, at *6.

But there was no evidence that these cuts caused serious bodily injury, so this was not an admission to the charged offense—first degree felony aggravated assault causing serious bodily injury. *See* Tex. Penal Code §22.02(b)(1).

At most, Appellant admitted to committing a separate, lesser-included, uncharged offense—e.g., second-degree felony aggravated assault, with a deadly weapon, but without serious bodily injury. *See* Tex. Penal Code § 22.02(b).

The fact that Appellant admitted to a separate, lesser-included, uncharged offense does not change the fact that he did not admit to committing the offense with which he was charged (i.e., aggravated assault

causing serious bodily injury) Thus, he was not entitled to a self-defense instruction on the charged offense.

Appellant might have been entitled to a self-defense instruction *on the lesser offense*, if it had been included in the jury charge. But the only offense in the jury charge was aggravated assault causing serious bodily injury, and Appellant did not admit to that offense. To the contrary, he explicitly denied it.

It is true (as noted by the court of appeals) that whether an injury constitutes "serious bodily injury" is a question of fact for the jury. But there must be some evidence in the record to support such a finding. In this case, there was no evidence that any cut (other than the scalp injury) caused serious bodily injury, so Appellant's admission to causing other cuts is not an admission to the offense of aggravated assault causing serious bodily injury.

It is also true (as noted by the court of appeals) that *Gamino* held that the defendant does not necessarily have to admit to "every element" of the offense in order to be entitled to a self-defense instruction. But *Gamino* is distinguishable.

In *Gamino*, the defendant did not admit to the element of threatening the victim in an aggravated assault case. But this Court held that the threat

element could be *inferred* from the defendant's admission that he grabbed his gun and said, "Stop, leave us alone, get away from us." Under those facts, the Court held that the defendant sufficiently admitted to the commission of the offense, as required by the confession-and-avoidance doctrine. *Gamino v. State*, 537 S.W.3d 507, 512 (Tex. Crim. App. 2017).

Similarly, in two other cases, although the defendants denied elements of the offense, this Court held that they were entitled to justification defenses because the elements could be inferred from the defendants' testimony. *See Juarez v. State*, 308 S.W.3d 398, 409 (Tex. Crim. App. 2010) (holding that the defendant was entitled to a necessity defense instruction, even though he denied the mens rea element of the offense, because the mens rea could be inferred from his testimony), *and Cornet v. State*, 359 S.W.3d 217, 226-28 (Tex. Crim. App. 2012) (holding that the defendant was entitled to a medical-care defense instruction, even though he denied the element of penetration, because penetration could be inferred from his testimony).

Here, by contrast, the element of "causing serious bodily injury" could not be inferred from Appellant's testimony because Appellant flatly denied causing the scalp injury. More than that, Appellant testified that Sarah caused the scalp injury herself, and that the scalp injury occurred before

any defensive struggle began, which precludes the possibility that Appellant caused it during the struggle. Finally, there is no evidence that any other cuts or injuries amounted to "serious bodily injury."

In short, there is no way to infer the element of "causing serious bodily injury" from Appellant's testimony, so Appellant was not entitled to a self-defense instruction in this case.

The court of appeals also observed that the defendant does not have to admit to "the State's version of events" or "the type of force alleged by the State" to be entitled to a self-defense instruction. But the court cited to cases where the defendants essentially admitted to committing the charged offenses and causing the injuries alleged in the indictments, even though their version of events differed from the State's. *See Holloman v. State*, 948 S.W.2d 349, 352 (Tex. App.—Amarillo 1997, no pet.); *Hubbard v. State*, 133 S.W.3d 797, 801-02 (Tex. App.—Texarkana 2004, pet. ref'd); *Torres v. State*, 7 S.W.3d 712, 716 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd);.

This is not a case where the defendant essentially admitted to committing the charged offense or the injury alleged in the indictment, albeit by a different version of events, or type of force, or manner and means. This is a case where the defendant wholly denied committing the

only assault that caused serious bodily injury. Thus, the cases cited above are inapposite.

Finally, the court of appeals cited to *Alonzo* and *VanBrackle*. Reliance on *Alonzo* is misplaced because the State did not argue the confession-and-avoidance doctrine in that case, and because Alonzo essentially admitted to causing the victim's death during a struggle. *Alonzo v. State*, 353 S.W.3d 778, 780, 783 (Tex. Crim. App. 2011). *VanBrackle* is also inapplicable because multiple witnesses testified that the defendant acted in self-defense in that case. *VanBrackle v. State*, 179 S.W.3d 708, 714 (Tex. App.—Austin 2005, no pet.). Neither case supports a holding that Appellant was entitled to a self-defense instruction in this case.

In sum, the State asks this Court to hold that, under the confession-and-avoidance doctrine, a defendant is not entitled to a self-defense instruction on the charge of aggravated assault causing serious bodily injury when the defendant denies causing the only serious bodily injury in the case and claims that the serious bodily injury was caused by someone else.

Second Question for Review: Does an appellate court correctly apply the standard of review for harm when it fails to consider significant evidence of guilt and the defensive theory put forth at trial, which was that the defendant did not commit the charged offense, not that he committed it in self-defense?

I. The appellate court must consider the entire record.

In assessing harm, the appellate court must consider the totality of the record, including the entire jury charge, the state of the evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole. *Cornet v. State*, 417 S.W.3d 446, 449-50 (Tex. Crim. App. 2013).

Furthermore, the trial record must demonstrate that there is some actual harm before the case can be reversed and remanded for a new trial. *Id.*

II. The court of appeals erred in finding that the jury charge weighed in favor of a finding of harm.

In finding harm, the court of appeals noted that the lack of a self-defense instruction "is generally harmful because its omission leaves the jury without a vehicle by which to acquit a defendant who has admitted to all the elements of the offense." *Foster*, 2018 WL 3543482, at *7, *quoting Cornet,* 417 S.W.3d at 451. The court then found that Appellant's jury had "no option of acquitting [Appellant] of the charges in light of his admissions." *Foster*, at *7. The opinion then cited to a case where self-

defense was the only defensive theory, making the defendant's conviction a virtual inevitability in light of his confession to the offense. *Id.*, *citing Dugar v. State*, 464 S.W.3d 811, 822 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd).

Unlike the cases relied on by the court of appeals, Appellant *did not* admit to all the elements of the offense. To the contrary, he flatly denied committing the only serious bodily injury in this case. Thus, his conviction was not a "virtual inevitability" in light of "his admissions."

Additionally, unlike the cases cited above, self-defense was not Appellant's "only defensive theory." It was not even his main theory. To the contrary, Appellant testified (and his counsel argued) that he did not scalp Sarah. This was not a self-defense case. This was an "I didn't do it" defense. As such, Appellant was not harmed by the lack of a self-defense instruction.

Moreover, the jury charge instructed the jury to acquit if they had a reasonable doubt as to whether the defendant caused serious bodily injury. CR 86-87. Their verdict shows that they did not have a reasonable doubt, so they clearly did not believe Appellant's story, not even a little bit.

In sum, the first factor weighs in favor of a finding of no harm in light of the defendant's actual defense (that he did not cause the scalp injury) and the jury charge (which instructed the jury to acquit if it had a reasonable

doubt about whether the defendant caused serious bodily injury). The jury had a vehicle with which to acquit Appellant. They chose not to do so. Their verdict should stand.

III. The court of appeals erred in finding that the arguments of counsel would seem to weigh in favor of a finding of harm.

The court of appeals found that the arguments would seem to weigh in favor of a finding of harm because defense counsel raised self-defense in his opening statement and closing argument. *Foster*, 2018 WL 3543482, at *7.

It is true that defense counsel raised self-defense in opening, stating that the evidence would show that Appellant was cut first and was fighting to protect his life. Perhaps that was going to be the defensive theory, but it was no longer the theory once Appellant testified that he did not cause the scalp injury, and that Sarah caused the scalp injury herself.

It is also true that defense counsel mentioned self-defense in closing argument, but what he said was that self-defense was not in the charge because "we can't claim self-defense for something that we claim we did not do." 7RR 175. Far from being deprived of their only defensive theory, counsel was saying that self-defense was *not* their defensive theory and that their theory was that Appellant did not do it.

Furthermore, defense counsel argued that "the sole issue is who scalped [Sarah]." 7RR 178. This argument does not accord with a theory of self-defense, but it does comport with the actual defensive theory, which was that Appellant did not cause the scalp injury.

It is clear from counsel's arguments that the defensive theory was not self-defense. It was that Appellant did not commit the offense. This was not a self-defense case. This was an "I didn't do it case." As such, Appellant was not harmed by the lack of a self-defense instruction.

The court of appeals also found harm in the State's closing argument because it referenced Appellant's admission to cutting Sarah's chin and hair in the struggle over the knife. *Foster*, 2018 WL 3543482, at *7. But the State's point was not that Appellant should be convicted based on this testimony or these cuts. Rather, in context, the State's point was that Appellant's testimony was inconsistent and untrue. 7RR 183. The State never asked the jury to convict Appellant based on his admission to cutting Sarah's chin and hair in a struggle. To the contrary, the State focused exclusively on the scalp injury in asking the jury to convict. 7RR 171, 181-82. In fact, no one—neither the State, nor the defense, nor the trial court—ever argued or implied to the jury that these other cuts could be the basis for the charged offense. Moreover, there is no way the jury could have convicted

Appellant based on the cuts to Sarah's chin or hair during the struggle—even if the State had asked them to do so—because there was no evidence that these cuts caused serious bodily injury, an element the State had to prove beyond a reasonable doubt.

Finally, in its harm analysis, the court of appeals noted that the parties spent a lot of time on self-defense in voir dire. *Foster*, 2018 WL 3543482, at *8. However, this was ultimately irrelevant because Appellant's defensive theory was that he did not cause the scalp injury (not that he caused the injury in self-defense).

In sum, the court of appeals ignored the fact that no one argued that the cuts to Sarah's chin and hair could be the basis for this offense. It ignored the fact that the parties focused exclusively on the scalp injury. And it ignored the fact that Appellant's defensive theory was that he did not commit the offense, not that he did it in self-defense. For all of these reasons, Appellant was not harmed by the lack of a self-defense instruction.

IV. The court of appeals erred in finding that the entirety of the evidence weighed in favor of a finding of harm.

The court of appeals found that this factor weighed in favor of a finding of harm, emphasizing that Appellant admitted in his testimony to injuring Sarah (i.e., the cuts to her chin and hair during the struggle over the knife),

that the detective noted that Appellant may have had defensive wounds to his hands, that Sarah expressed concern that she would be charged for her conduct, and that Appellant said, in a recorded jail call, that Sarah held a knife to his throat. *Foster*, 2018 WL 3543482, at *8.

But the court of appeals ignored the fact that there was no evidence indicating that the cuts to Sarah's chin and hair caused serious bodily injury. It ignored the fact that the scalp injury is the only serious bodily injury in this case, and thus, the only injury that the offense could be based on. It ignored the fact that Appellant testified that he did not cause the scalp injury. 7RR 128 ("I did not scalp her"). It ignored the fact that Appellant testified that Sarah caused the scalp injury herself. 7RR 99-100. It ignored the fact that Appellant testified that Sarah caused the scalp injury *before* the struggle over the knife, which means there is no way that Appellant could have caused the injury during the struggle. 7RR 100-02. Again, Appellant's testimony makes clear that this was not a self-defense case. This was an "I didn't do it" case. As such, Appellant was not harmed by the lack of a self-defense instruction.

The court of appeals also failed to adequately take into account evidence "significantly undermining" Appellant's claim of self-defense. *Foster*, 2018 WL 3543482, at *8. As laid out below, the evidence of guilt was

overwhelming, and Appellant's defense was weak, incredible, and controverted. As such, the court of appeals erred in finding that the evidence as a whole weighed in favor of a finding of harm.

First and foremost, in examining the evidence undermining Appellant's claim of self-defense, is the victim's testimony. At trial, Sarah testified about the events leading up to the aggravated assault. She testified that she was upset because she had just lost her job and that she decided to take a bath. She said Appellant brought two knives into the bathroom and told her that she should kill herself. 7RR 21. While Sarah was taking a bath, Appellant realized that he could not find his phone. Sarah tried to help him find it, and he screamed at her. 7RR 22. He broke her laptop, then he left the house and she locked all the doors. 7RR 22-23.

A couple minutes later, Appellant busted in the front door and began to beat and strangle Sarah. 7RR 23-25. Sarah thought she was going to die. 7RR 25. She tried to run to a neighbor for help when Appellant let up, but he followed her and dragged her back inside. 7RR 26.

Sarah testified that Appellant then cut off her hair with a serrated knife, and that it was extremely painful. 7RR 27-28. Sarah later realized he had cut the back of her head (i.e., the scalp injury). 7RR 31.

Sarah was able to grab the knife from Appellant, and she held it to his neck, but Appellant laughed and got control of the knife again. 7RR 28-29. He held the knife to her neck and told her he was going to kill her. 7RR 29-30.

At this point, Sarah realized that she had defecated on herself, and she begged Appellant to let her take a bath. 7RR 30. Appellant let her, but he sat by the bathroom door with the knife so she could not leave. 7RR 30-31.

Appellant was intoxicated, and he passed out. 7RR 32. Sarah grabbed the knife, plus the other two knives from when Appellant told her she should kill herself, and put them in the bathtub with her. 7RR 32. The police arrived shortly thereafter. 7RR 33.

In addition to describing the events of that night, Sarah testified about a history of abuse:

- They met in February of 2015. It was a very abusive relationship, and Sarah spent most of the relationship in fear. 7RR 9-10.
- A month into the relationship, Appellant got upset with Sarah and punched her in the face. 7RR 10.
- Additionally, the police were called to Sarah's house in March of 2015 because Appellant hit her and the neighbors called the cops. Sarah lied to the police about the cause of her injuries because she

loved Appellant, she did not want him to go to jail, and she thought he just hit her because he was drunk. 7RR 11.

- Appellant got mad at her again in December of 2016 and used her face as a punching bag. 7RR 12.
- Appellant tried to isolate her from friends and family. He tried to convince her that her family was going to commit her to a mental institution, and that no one loved her like he did. 7RR 12-13.
- Appellant was rough during sex, choking her and pulling her hair, and Sarah was scared of him. 7RR 13.
- Appellant dragged her by her hair to the bedroom to have sex, and he would not take 'no' for an answer. 7RR 14.
- Appellant punched her several times in the face in January of 2017. 7RR 14.

Moreover, in this case, the jury did not just have the victim's word. They also had extensive evidence that corroborated her testimony (and contradicted Appellant's testimony) including:

- On the night of the offense, the neighbor called 911 and reported that Sarah was "banging on my door to open it because he's beating her." The neighbor said she could hear Sarah "screaming, pleading to stop." SX 1.

- Multiple witnesses testified that Sarah was distraught, shaking, crying, and badly beat up, as detailed in graphic pictures admitted into evidence. 6RR 44, 75, 80, 85, 88-89, 122-26, 129; 7RR 80; SX 8-38, 56-61.
- Sarah's blood was on the neighbor's door. 6RR 143; SX 41.
- Sarah's front door was busted in. 6RR 139, 143-44; SX 42-43.
- Sarah's computer was broken. SX 49-50.
- Sarah's blood, hair, and feces were smeared throughout her house, and knives were found in her bathtub, consistent with her testimony. 6RR 39, 45-49, 139-46; SX 2-6, 44-48, 51-53.
- A registered nurse testified that there were four fingers and a thumb mark on Sarah's neck. It appeared that someone had choked her. 6RR 129.
- A victim counselor testified that defecation indicates a severe strangulation episode, one where the victim needed immediate medical attention. 6RR 194.
- Sarah's mother testified that she was talking to Sarah on the phone the night of this offense. Sarah said that she was afraid and that Appellant was bullying and harassing her, then the call "went dead." Her mother could not reach Sarah by phone again that

night, but she received a text from Sarah that said "I'm okay." 7RR 78-79.

- Sarah testified that she did not send the "I'm okay" text. 7RR 72.
- Sarah's phone and keys were found in Appellant's jacket pocket. 7RR 35; 80-81.
- Sarah's mother testified about a prior assault where Appellant beat Sarah in December of 2016. Sarah's face was swollen, she had black eyes, and dried blood dripped from her ear. 7RR 76.
- The paramedic testified that he responded to another assault by Appellant against Sarah just one week before this assault. 6RR 90; 7RR 33-34.
- Appellant repeatedly called Sarah after the assault (over 50 calls) to tell her that this would never happen again and that she needed to recant her statement and say the assault never happened. 7RR 38, 71.

Against all of this, the jury had Appellant's unbelievable version of events, where he claimed that Sarah scalped herself, defecated on herself on purpose, and then attacked him with a knife.

The court of appeals erred in failing to consider significant evidence of guilt that corroborated the victim's testimony and contradicted Appellant's

testimony, as laid out above. The court also erred in failing to take into account that Appellant's version of events was simply unbelievable.

The appellate court should have weighed all of this in its harm analysis, just as it would in any other jury charge harm analysis, because it is not enough that an error occurred. The appellate court must look at the entire record, including all of the evidence, to see if the complaining party was actually harmed by the error. It is one thing to find error in failing to give a self-defense instruction on weak facts, but it is quite another to find harm where there is overwhelming evidence of guilt and the defensive evidence is weak and unbelievable.

In sum, the court of appeals did not correctly apply the standard of review for harm because it did not consider the entire record. First and foremost, the court did not recognize that the actual defensive theory put forth at trial was that Appellant did not commit the charged offense, not that he committed it in self-defense. Consequently, the court failed to consider that the jury had a vehicle by which to acquit the defendant, the jury simply chose not to do so. The court of appeals also failed to recognize that the cuts to Sarah's chin and hair did not amount to serious bodily injury, so they could not be the basis for a conviction, and indeed, no one ever argued that they could be. Thus, there was no harm in failing to give a

self-defense instruction as to these cuts. Finally, the court did not properly account for the significant evidence of guilt, or the fact that Appellant's version of events was simply unbelievable.

Appellant was not harmed by the lack of a self-defense instruction, and the court of appeals erred in holding otherwise.

Prayer

The State asks this Court to reverse the decision of the Court of Appeals and affirm the trial court's judgment.

Respectfully submitted,

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Certificate of Compliance and Service

I certify that this petition contains 6,106 words, excepting contents that may be excluded per Rule 9.4(i)(1). I further certify that, on 17th day of July 2019, a true and correct copy of this petition was served through the electronic filing manager on:

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APPENDIX

Opinion of the Court of Appeals

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00669-CR

John Christopher Foster, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 403RD JUDICIAL DISTRICT
NO. D-1-DC-17-201020, HONORABLE BRENDA KENNEDY, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

John Christopher Foster was charged with aggravated assault family violence for allegedly assaulting Sarah Morris, who Foster had a dating relationship with at the time, and for using a deadly weapon during the offense. *See* Tex. Penal Code §§ 22.01(a) (listing elements of offense of assault), .02(a)-(b)(1) (providing that defendant commits aggravated assault if he "causes serious bodily injury to another" and that offense is first-degree felony if defendant uses deadly weapon "and causes serious bodily injury to a person whose relationship to or association with the defendant is described by" provisions of Family Code). During the trial, Foster requested a jury instruction on self-defense, but the district court denied that request. At the end of the guilt-or-innocence phase, the jury found Foster guilty of the charged offense and also found that Foster used a deadly weapon during the offense. At the end of the punishment phase, the jury assessed Foster's punishment at seventeen years and six months' imprisonment. *See id.* § 12.32 (listing punishment

range for first-degree felony). The district court rendered its judgment of conviction in accordance with the jury's verdicts. In two issues on appeal, Foster argues that the district court erred by denying his request for an instruction on self-defense and by failing to convene a hearing on his motion for new trial. We will reverse the district court's judgment of conviction and remand for further proceedings.

BACKGROUND

As set out above, Foster was charged with aggravated assault family violence. Originally, the indictment alleged that Foster assaulted Morris by "intentionally, knowingly, and recklessly caus[ing] serious bodily injury to . . . Morris" in the following different ways: (1) "by grabbing . . . Morris with his hand," (2) "by squeezing . . . Morris with his hand," (3) "by striking . . . Morris with his hand," (4) "by pulling . . . Morris'[s] hair," and (5) "by cutting . . . Morris with a knife." The indictment also alleged that Foster committed the assault while using and exhibiting a deadly weapon (a knife). After the various witnesses testified at trial, the State abandoned the first three alternative assault allegations. Consistent with the remaining allegations, the jury charge instructed the jury to find Foster guilty if they determined that Foster "cause[d] serious bodily injury to . . . Morris . . . by . . . pulling . . . Morris'[s] hair[] or . . . cutting . . . Morris with a knife."

During the trial, Foster, Morris, Morris's neighbor, several medical personnel, and numerous law-enforcement officials testified. In addition, photographs of Morris's home and of injuries that Morris and Foster allegedly sustained were admitted into evidence. The photographs of Morris's home show blood, clumps of hair, and feces in several rooms. The photographs of Morris showed significant injuries to her face and head, including an injury to her scalp. Two photographs

taken of Foster on the day of the offense showed lacerations on his neck, and a photograph taken well after the offense purportedly showed a scar from an injury to Foster's armpit.

Furthermore, recordings of phone conversations between Foster and two individuals occurring while he was in jail and of a 911 call made by Morris's neighbor were admitted into evidence. On the recording of the 911 call, Morris's neighbor stated that Foster was beating Morris, that Morris knocked on the neighbor's door for help, and that the neighbor could hear Morris screaming and pleading with Foster to stop. On the recordings of the phone conversations from jail, Foster stated that he took a knife away from Morris after she held the knife to his throat, that his throat was cut when he pushed against the knife, that he cut his hand in the process, and that he cut Morris's hair.

During her testimony, Morris explained that Foster had assaulted her throughout their relationship by punching her in the face and that this occurred as recently as one week before the incident in question. Regarding the day of the alleged offense, Morris explained that Foster brought two knives to her before she was going to take a bath and told her how to kill herself, that he started yelling at her about the fact that he could not find his cell phone, that he left her home, and that she locked the door when he left. In addition, Morris related that Foster returned a few minutes later, "busted [the front door] open" while she was still in the living room, "start[ed] punching" her in the face, and strangled her neck with two hands. Further, Morris recalled that she felt her life "slipping away" while she was being strangled, that she thought she "was going to die," that she could not breathe, and that she "defecated [her]self" at some point.

Next, Morris explained that Foster stopped choking her to continue looking for his phone and that, at that point, she ran to her neighbor's house. Moreover, Morris stated that Foster grabbed her "by [her] hair and drag[ged her] back into the house," that he used a knife "to cut off [her] hair," that she fought for the knife and cut her hands during the struggle, that she held the knife to his neck and told him to stop, that Foster started laughing and regained possession of the knife, and that Foster said he was going to kill her. Additionally, Morris testified that she asked Foster to let her take a bath to clean herself, that Foster agreed but stated that he would stay in the bathroom with her and hold onto the knife, that Foster passed out because he was intoxicated, that she grabbed the knives and placed them in the bathtub, that the police showed up shortly thereafter, and that she left the home when the police arrived. Further, Morris specifically denied attacking Foster first.

In addition to Morris testifying, the State called Officer Matthew Murphy to the stand to discuss his observations on the night in question when he responded to a 911 call concerning Morris. Officer Murphy related that he first noticed blood on the front porch and doorframe, that he went inside the residence and saw more blood and also clumps of hair in the living room, that he observed Foster unconscious in the hallway with blood on his hand, that Foster "had long hairs stuck underneath" his fingernails, and that Foster "had some lacerations to his neck." Next, Officer Murphy recalled that he heard Morris call for help; that "she had swelling, discoloration, and blood covering the majority of her face"; that some of her hair was missing; that she had a laceration on her head; and that she had "red marks on her neck." When describing the extent of Morris's injuries, Officer Murphy stated that Morris had "significant swelling to the majority of her face" causing one of her eyes to be nearly swollen shut and that a large "area of skin . . . was completely missing

from her scalp." In addition, Officer Murphy testified that he found "two, possibly more, knives" in the bathtub.[1]

Following Officer Murphy's testimony, a paramedic, David Curvin, was called to the stand to discuss his treatment of Morris. Regarding Morris's injuries, Curvin explained that she had swelling to both eyes, had bruising on her face, had lacerations to her throat and left hand, had bruises on her knees, and "had an area on the back of her head where somebody had sliced a large portion of her scalp off." Regarding the last injury, Curvin explained that if the wound was not treated, it "could [have] become infected" and "could eventually [have] kill[ed] the patient." In addition, Curvin related that Morris told him that she had been "repeatedly struck with fists and the butt or handle of a knife" and that Foster tried to cut her hair off. When discussing the injuries to Morris's left hand, Curvin discussed how Morris told him that she injured her hand when "trying to get the knife away from" Foster and when "fighting off [Foster] . . . with his knife." Moreover, Curvin testified that Morris stated that Foster choked her to the point where she "almost passed out," that she was so scared during the incident that she defecated on herself, and that she thought that Foster "was going to kill" her.[2]

Next, the State called Detective Alfonso Anderson to the stand, and he testified that he went to the scene of the offense and spoke with Foster and Morris. When discussing his conversation with Foster, Detective Anderson related that Foster had long but "very superficial"

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[1] Testimony similar to that of Officer Murphy's was given by Officer Matthew Hootman, who also responded to the scene on the night in question.

[2] One of the nurses who treated Morris on the night in question, Kimberly Conklin, was called to the stand and provided similar testimony regarding the extent and nature of Morris's injuries.

"scratch marks along his throat," that Foster's hands looked swollen, and that Foster had cuts on his fingers. Regarding the injuries to Foster's hands, Detective Anderson stated that swollen hands can be a sign that the person has hit something with his hands, but Detective Anderson also testified that some of the injuries might have been defensive in nature. Additionally, Detective Anderson discussed how when he talked with Morris, she stated that she gathered the knives and placed them in the tub to hide them because she was afraid Foster was going to kill her. Further, Detective Anderson testified that Morris stated that Foster tripped her, got on top of her, punched her, and strangled her for two minutes, and Detective Anderson recalled that Morris also recounted that she defecated when she was being strangled, that Foster let her go for a moment, that she ran to her neighbor's home seeking help, that Foster brought her back to the house, that Foster picked up a knife, that Foster started "cutting her hair off," that he held the knife to her throat, and that he threatened to kill her. In addition, Detective Anderson recalled that Morris initially expressed concern that she might be charged for cutting Foster's neck.[3]

During his case in chief, Foster elected to testify and was called to the stand two times. In his first appearance on the stand, Foster admitted that he was seeing another woman and testified that on the night before the alleged offense, Morris wanted him to watch her have sex with another man to punish him for the affair. Further, Foster stated that he decided to leave Morris's home but that before he left, Morris grabbed his stuff and tackled him in the front yard in order to keep him from leaving. Regarding the day of the offense, Foster related that they had sexual

[3] In his testimony, Detective Anderson provided testimony similar to that given by other witnesses describing the scene and Morris's injuries.

intercourse but started to argue afterwards. When describing the argument, Foster recalled that he was "being a jerk to her" by saying "mean" things, that she threatened to kill herself, that she grabbed a knife, and that she "started to cut her hair off." Next, Foster recalled that Morris attacked him by cutting his neck, hand, and armpit with a knife.

Additionally, Foster testified that he defended himself because he believed that Morris was going to kill him, that they struggled for the knife, that she was holding the knife very close to herself, and that she sustained injuries from the knife during their struggle to get control of the knife. Regarding those injuries, Foster related that the knife made contact with Morris's body more than once resulting in a cut to her chin. When asked about some of the injuries to Morris's head, Foster denied "scalp[ing] her" but stated that "her hair could have gotten cut" during their struggle because she was holding the knife "close to her." In addition, Foster stated that he hit her and tried to hold her down by the neck when trying to get the knife, that he gained control of the knife, and that he threw the knife away. Finally, he denied assaulting her in the past but admitted that he hit her a couple of times after she hit him first.

After Foster finished testifying the first time, the district court stated that Foster "messed up [his] self-defense" because, according to the district court, the indictment charged Foster "with stabbing [Morris] with a knife and cutting her hair off," "because [he had] to admit to the conduct" to get the instruction, and because Foster did not admit to committing the charged conduct. Following that exchange, Foster was called to the stand again. In his testimony, Foster admitted that he cut Morris's "hair with a knife" during "the struggle."

Following his second round of testimony, Foster again requested an instruction on self-defense in light of the district court's prior explanation for why Morris was not entitled to a self-defense instruction and in light of Morris's subsequent testimony admitting to cutting Morris's hair with a knife. In response, the district court denied the request and stated that Foster's admission that he cut Morris's hair was "not enough" because Foster did not testify that he cut her hair in response to her aggression.

After the jury charge was prepared and after the jury considered the evidence presented during the trial, the jury found Foster guilty of the charged offense.

DISCUSSION

In his first issue on appeal, Foster contends that the district court erred by denying his request for a jury instruction on self-defense. In his second issue on appeal, Foster argues that the district court erred by failing to convene a hearing on his motion for new trial. Given our resolution of Foster's first issue on appeal, we need not reach the second issue.

Self-Defense Instruction

As indicated above, Foster contends that there was error in the jury charge. When reviewing an alleged jury-charge error, appellate courts first determine whether error exists and then, if so, ascertain whether the resulting harm is sufficient to warrant a reversal. *See Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015); *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). The amount of harm needed for a reversal depends on whether a complaint regarding "that error was preserved in the trial court." *Swearingen v. State*, 270 S.W.3d 804, 808 (Tex. App.—Austin

2008, pet. ref'd). If the defendant made a timely objection, reversal is required if there has been "*some* harm." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). However, if no objection was made, a reversal is warranted only if the error resulted in "egregious harm." *See Neal v. State*, 256 S.W.3d 264, 278 (Tex. Crim. App. 2008).

During trial, Foster requested an instruction on self-defense. "Self-defense is a justification for otherwise unlawful conduct." *Torres v. State*, 7 S.W.3d 712, 714 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). Under the Penal Code, "a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force." Tex. Penal Code § 9.31(a). "'Reasonable belief' means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." *Id.* § 1.07(a)(42).

When determining whether a defensive instruction should have been provided, appellate courts "view the evidence in the light most favorable to the defendant's requested" instruction. *Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006). In general, a defendant is entitled to a jury instruction on a defensive issue if the defensive issue "is raised by the evidence, regardless of the strength or credibility of that evidence." *Farmer v. State*, 411 S.W.3d 901, 906 (Tex. Crim. App. 2013). However, an instruction "is not required" if the evidence "does not establish the defense." *Williams v. State*, Nos. 03-14-00228—00229-CR, 2016 WL 370019, at *4 (Tex. App.—Austin Jan. 27, 2016, no pet.) (mem. op., not designated for publication). "A defendant's testimony alone may be enough to require a self defense instruction." *Maxwell v. State*, No. 03-06-00473-CR, 2007 WL 2274883, at *2 (Tex. App.—Austin Aug. 6, 2007, pet. struck) (mem. op., not

designated for publication). "A trial court errs in denying a self defense instruction if there is some evidence, from any source, when viewed in the light most favorable to the defendant, that will support the elements of self defense." *Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017). "Whether a defense is supported by the evidence is a sufficiency question reviewable on appeal as a question of law." *Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007).

"In determining whether a defense is thus supported, a court must rely on its own judgment, formed in the light of its own common sense and experience, as to the limits of rational inference from the facts proven." *Id.* "[W]hen the defensive evidence merely negates the necessary culpable mental state, it will not suffice to entitle the defendant to a defensive instruction." *Id.* at 659. "Rather, a defensive instruction is only appropriate when the defendant's defensive evidence essentially admits to every element of the offense *including* the culpable mental state, but interposes the justification to excuse the otherwise criminal conduct." *Id.*; *see also Juarez v. State*, 308 S.W.3d 398, 404 (Tex. Crim. App. 2010) (explaining that doctrine of confession and avoidance "requires an admission to the conduct, which includes both the act or omission and the requisite mental state"). However, "[a]dmitting to the conduct does not necessarily mean admitting to every element of the offense." *Gamino*, 537 S.W.3d at 512. "For example, a defendant" can essentially admit to the commission of murder but still deny "an intent to kill." *Id.*

Viewing the evidence in the light most favorable to Foster's requested instruction, evidence was presented during the trial indicating that Morris had physically tackled Foster on the day before the alleged offense; that Morris initiated an assault on the day in question by using a knife to cut Foster on his neck, hand, and armpit; and that Morris expressed concern that she might be

charged for the injuries that she inflicted on Foster. In addition, photographs were admitted into evidence showing that Foster had a laceration on his neck on the night in question and showing that Foster had a scar near his armpit. Furthermore, Foster testified that he believed that Morris was going to try and kill him and decided to try to take the knife from Morris by wrestling it away from her. Additionally, Foster admitted that as a result of that struggle, Morris sustained cuts to various parts of her body.

In its brief, the State asserts that the evidence summarized above is insufficient to have warranted a self-defense instruction because Foster "did not admit to scalping" Morris, which the State urges Foster was required to do in order to be entitled to an instruction. As support for this proposition, the State notes that Foster was charged with aggravated assault, which requires proof of serious bodily injury, *see* Tex. Penal Code § 22.02 (providing that person commits aggravated assault by committing assault that "causes serious bodily injury to another"), and urges that "the only injury that qualified as 'serious bodily injury'" based on testimony given at trial "was an injury on the back of [Morris]'s head where someone sliced off a large portion of her scalp," *see also id.* § 1.07(a)(46) (defining "'[s]erious bodily injury'" as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ").[4]

[4] As support for these arguments, the State primarily relies on two prior opinions from this Court. *See Guzman v. State*, No. 03-13-00131-CR, 2015 WL 2400238 (Tex. App.—Austin May 13, 2015, pet. ref'd) (mem. op., not designated for publication); *Maxwell v. State*, No. 03-06-00473-CR, 2007 WL 2274883 (Tex. App.—Austin Aug. 6, 2007, pet. struck) (mem. op., not designated for publication). In both of those cases, the defendants admitted to some conduct, but they both denied that their actions injured the alleged victims. *See Guzman*, 2015 WL 2400238, at *11 (observing that "although appellant admitted that he struggled with Gay for the gun, he did not admit that he

As an initial matter, we note that the indictment did not allege that Foster caused an injury to Morris's scalp; rather, the indictment asserted alternative means in which Foster allegedly committed aggravated assault, including cutting Morris with a knife. Moreover, as described above, Foster admitted that as a result of his struggle to get the knife away from Morris, Morris sustained cuts from the knife, including cuts to her chin and to "her hair." Accordingly, although his testimony is inconsistent, Foster admitted to the criminal conduct alleged in the indictment of cutting Morris with a knife and arguably admitted to causing an injury to her scalp. *Cf. Miller v. State*, 312 S.W.3d 209, 213 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd) (explaining that determination regarding whether injury constitutes serious bodily injury is "a question of fact for the jury to decide").

Moreover, assuming for the sake of argument that Foster did not admit to causing the injury to Morris's scalp that served as the focus for much of the testimony presented at trial, that would not compel a conclusion that Foster was not entitled to a self-defense instruction in the circumstances present here, particularly where Foster did admit, consistent with the charges presented in the indictment, that his actions resulted in Morris being cut with a knife. On the contrary, the court of criminal appeals has indicated that a defendant is "'not required to concede the State's version of the events' in order to be entitled to a self defense instruction." *See Gamino*,

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committed the assaultive conduct alleged" because he "repeatedly denied ever hitting or kicking Gay, adamantly maintained that he did not cause her injuries, asserted that the injuries were self-inflicted by Gay, and suggested that the injuries were caused by other objects (such as the mailboxes) during their struggle over the gun"); *Maxwell*, 2007 WL 2274883, at *2 (noting that "although Maxwell admitted that he struggled for a gun, he did not admit that he fired the gun or that he fired the shot that killed Ramirez"). In contrast, in this case, although his testimony was inconsistent, Foster did admit that his actions resulted in Morris being cut multiple times with a knife when he struggled with Morris in order to take the knife away from her, and the indictment in this case alleged that Foster cut Morris with a knife.

537 S.W.3d at 512 (quoting *Gamino v. State*, 480 S.W.3d 80, 88 (Tex. App.—Fort Worth 2015), *aff'd*, 537 S.W.3d 507). Moreover, opinions by our sister courts of appeals have also indicated that if a defendant admits to using force against an alleged victim, as provided under the self-defense provision of the Penal Code, *see* Tex. Penal Code § 9.31(a), he should not "be denied the defense simply because he refused to admit to using the type of force alleged by the State," *see Holloman v. State*, 948 S.W.2d 349, 352 (Tex. App.—Amarillo 1997, no pet.) (commenting that "[i]t would be nonsensical to prohibit the defendant from claiming self-defense" if he admitted to using force in manner different from that alleged in indictment); *see also Hubbard v. State*, 133 S.W.3d 797, 801-02 (Tex. App.—Texarkana 2004, pet. ref'd) (stating that "even if a defendant denies the specific allegations in the indictment, he or she is not necessarily precluded from raising defensive issues as long as he or she sufficiently admits conduct underlying the offense and provides evidence justifying a defensive instruction"); *Torres*, 7 S.W.3d at 716 (determining that defendant raised issue of self-defense even though he denied "intentionally and knowingly causing bodily injury to" his wife because he admitted "to grabbing his wife by her hair, possibly hitting her in the face . . . , struggling with her, and pushing her away").

In light of the preceding and given the standard by which we are required to review this type of alleged jury-charge error, we conclude that evidence was presented that Foster reasonably believed that his use of force was immediately necessary to protect himself against Morris's use of unlawful force and conclude that the district court erred by not submitting a self-defense instruction. *Cf. Alonzo v. State*, 353 S.W.3d 778, 780, 783 (Tex. Crim. App. 2011) (determining that testimony from defendant that victim "attacked him with . . . a metal object, that the two engaged in a struggle,"

that victim grabbed spike, that victim attacked defendant with spike, that they struggled for control of spike, and that next thing defendant knew was that victim had "a hole in his chest" that "must have happened during the struggle" when they "were so close fighting" was sufficient "to raise the issue of self-defense"); *VanBrackle v. State*, 179 S.W.3d 708, 714 (Tex. App.—Austin 2005, no pet.) (noting that "[w]hether the events in question actually transpired in the manner described by the defensive testimony and whether appellant's conduct was reasonable under the circumstances are fact issues to be determined by a jury").

Having determined that there was error in the jury charge, we must now determine whether Foster was harmed by the error. As set out above, Foster's request for the instruction was denied by the district court, and we, accordingly, assess whether Foster suffered some harm by the omission. *See Jiminez v. State*, 953 S.W.2d 293, 299 (Tex. App.—Austin 1997, pet. ref'd). In this type of analysis, reviewing courts "consider: (1) the jury charge as a whole, (2) the arguments of counsel, (3) the entirety of the evidence, and (4) other relevant factors present in the record." *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). Although the standard is less stringent than the analysis performed when an objection is not made, the reviewing court must still "find that the defendant 'suffered some actual, rather than merely theoretical, harm from the error.'" *Id.* (quoting *Warner v. State*, 245 S.W.3d 458, 462 (Tex. Crim. App. 2008)). If there has been an objection, a reversal is warranted when the error is "calculated to injure the rights of the defendant." *Id.* (quoting *Almanza*, 686 S.W.2d at 171). "In other words, a properly preserved error will require reversal as long as the error is not harmless." *Gamino*, 480 S.W.3d at 90.

Moreover, we note that the absence of a confession-and-avoidance-defense instruction "is generally harmful because its omission leaves the jury without a vehicle by which to acquit a defendant who has admitted to all the elements of the offense." *Cornet v. State*, 417 S.W.3d 446, 451 (Tex. Crim. App. 2013); *see also id.* (stating that "[i]n general, when there is a single offense tried before a jury, it is impossible to determine how a jury would have weighed the credibility of the evidence on a defensive issue, and, therefore, appellate courts have reversed convictions in order to permit the jury to decide whether it believes the defensive evidence"). In addition, we note that if the issue of self-defense is raised by the evidence, the State has the burden of proving "beyond a reasonable doubt that the defendant did not act in self-defense." *VanBrackle*, 179 S.W.3d at 717 (citing Tex. Penal Code § 2.03(d)). In other words, "[h]ad the jury in this cause been properly instructed, it needed only to have a reasonable doubt as to whether [Foster]'s actions were justified by self-defense to render an acquittal." *Id.*

Turning to the first factor, the district court denied Foster's request for an instruction on self-defense. As a result, the jury was not given the opportunity to consider whether the evidence regarding Foster's alleged use of force could be legally justified as self-defense and had no option of acquitting Foster of the charges in light of his admissions. *See Dugar v. State*, 464 S.W.3d 811, 822 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (explaining that when self-defense "instruction was taken away from the jury, appellant was left without his only defensive theory, making his conviction a virtual inevitability"). Accordingly, this factor weighs in favor of a determination that Foster was harmed by the error.

Regarding the parties' arguments, Foster discussed self-defense during his opening and closing statements. In particular, he asserted during his opening statement that the evidence

would show that Morris was the aggressor, that Morris assaulted Foster with a knife first, and that Foster fought back to "protect his life," and Foster also related that the jury should consider his "evidence of self-defense" when making their determination. In his closing arguments, Foster attacked the victim's credibility and urged that the State had not proved its case beyond a reasonable doubt, but Foster also noted that there was no self-defense instruction in the jury charge and that he could not argue self-defense in this case. Moreover, the State in its closing referenced the portions of Foster's testimony in which he admitted that his actions resulted in Morris being cut. Accordingly, this factor would seem to weigh in favor of a determination that Foster was harmed by the absence of a self-defense instruction in the jury charge.

Turning to other portions of the record, we note that during voir dire, the State and Foster both emphasized self-defense. In particular, the State listed the elements of the defense and provided examples of when self-defense might and might not be warranted. Additionally, Foster focused on self-defense and extensively questioned the panelists about whether they could entertain a self-defense instruction when the defendant is a man and when the alleged victim is a woman. Further, the district court explained during voir dire what the elements of self-defense are and stated that if the elements were met, then there would be an instruction for that defense in the jury charge. Later, the district court went through the elements again after displaying the statutory provision for the jury panelists to examine, questioned the panel about whether they thought that "a man can't ever have a self-defense claim against a woman," and discussed what types of force would be considered a reasonable response to an attack. Given the focus on self-defense and in light of the district court's statement that an instruction would only be provided if the evidence warranted an instruction, we

believe that this factor weighs in favor of a determination that Foster was harmed by the omission. *Cf. Johnson v. State*, 271 S.W.3d 359, 368 (Tex. App.—Beaumont 2008, pet. ref'd) (noting as part of harm analysis that defendant questioned jury panel on defensive theory).

Regarding the evidence presented at trial, we note, as summarized above, that Foster admitted in his testimony to using force against Morris that resulted in Morris being injured and asserted that he was defending himself against Morris's alleged assault, and photographs of injuries that Foster purportedly sustained on the night in question were admitted into evidence and shown to the jury. In addition, Detective Anderson testified that Foster may have had defensive wounds to his hands and that Morris expressed concern that she might be charged for her conduct on the night in question. Moreover, on the recordings of Foster's phone conversations, Foster stated that Morris held the knife to his throat.

Unquestionably, other evidence was presented during trial indicating that Morris did not assault Foster on the night in question and significantly undermining Foster's claim of self-defense. However, in light of the evidence raising the issue of self-defense, of our resolution of the factors discussed above, and of the governing case law indicating that the denial of a defensive instruction in cases involving a single offense is generally harmful, *see Cornet*, 417 S.W.3d at 451, we cannot conclude that the absence of a self-defense instruction was harmless under the circumstances present here.

For all of these reasons, we conclude that the district court erred by denying Foster's request for a self-defense instruction and that the failure to provide that instruction resulted in some harm to Foster. *Cf. Johnson*, 271 S.W.3d at 368-69 (determining that defendant was harmed by

absence of defensive instruction where defendant admitted that she stabbed victim "to stop him from jumping on her or hitting her" but where "jury was not instructed to consider" defensive theory, which prevented jury from considering acquitting defendant "by reason of her immediate need to defend herself"); *VanBrackle*, 179 S.W.3d at 717 (concluding that trial "court's refusal to instruct the jury on self-defense caused some harm to appellant" despite significant deficiencies in defensive evidence). Accordingly, we sustain Foster's first issue on appeal.

Having sustained Foster's first issue on appeal, we need not address Foster's second issue on appeal.

CONCLUSION

Having sustained Foster's first issue on appeal, we reverse the district court's judgment of conviction and remand for further proceedings consistent with this opinion.

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David Puryear, Justice

Before Justices Puryear, Pemberton, and Bourland

Reversed and Remanded

Filed: July 24, 2018

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